Supreme Court, U.S.
FILED
AUG 23 1999
OFFICE OF THE CLERK

No. 98-2055

# In the Supreme Court of the United States

WILLIAM C. DUNN AND DELTA CONSULTANTS, INC.,
PETITIONERS

*v.*

COMMODITY FUTURES TRADING COMMISSION

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT*

## BRIEF FOR THE RESPONDENT IN OPPOSITION

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## QUESTION PRESENTED

Whether the district court abused its discretion in denying petitioners an award of attorneys fees on the ground that the Commodity Futures Trading Commission was "substantially justified" in asserting jurisdiction over petitioners' dealings in options on foreign currencies, even though this Court later rejected the statutory construction (and controlling circuit precedent) on which the Commission relied.

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### OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-5a) is reported at 169 F.3d 785. The order of the district court (Pet. App. 6a-11a) is unreported.

### JURISDICTION

The judgment of the court of appeals was entered on March 26, 1999. The petition for a writ of certiorari was filed on June 23, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

### STATEMENT

1. In April 1994, the Commodity Futures Trading Commission (CFTC) brought suit against petitioners and other defendants in the United States District Court for the Southern District of New York. See Pet. App. 7a. The suit charged that petitioners had com-

mitted fraud in connection with commodity option contracts, in violation of the Commodity Exchange Act (CEA), 7 U.S.C. 1 *et seq.*, and associated regulations. Pet. App. 7a. Among other things, the Commission sought the appointment of a temporary receiver to locate, preserve, and control petitioners' property for the benefit of their customers. See *id.* at 7a, 16a.

Petitioners sought dismissal of the Commission's complaint on the ground that the Commission lacked any jurisdiction over the contracts in which they dealt, which were options on foreign currency. Pet. App. 7a-8a. They relied on the so-called "Treasury Amendment" to the CEA, 7 U.S.C. 2(ii), which provides:

> Nothing in this chapter shall be deemed to govern or in any way be applicable to transactions in foreign currency, security warrants, security rights, resales of installment loan contracts, repurchase options, government securities, or mortgages and mortgage purchase commitments, unless such transactions involve the sale thereof for future delivery conducted on a board of trade.

In *Salomon Forex, Inc.* v. *Tauber*, 8 F.3d 966, 976 (1993), cert. denied, 511 U.S. 1031 (1994) (*Tauber*), the Fourth Circuit had held that the Treasury Amendment "applie[d] to *all* transactions in which foreign currencies [were] the subject matter, including options."

In asserting jurisdiction over petitioners' conduct, the Commission relied on Sections 2(a)(1)(A)(i) and 4c(b) of the CEA, 7 U.S.C. 2(i) and 6c(b), which give the Commission jurisdiction over trading in options, and on the Second Circuit's decision in *CFTC* v. *American Board of Trade, Inc.*, 803 F.2d 1242 (1986) (*ABT*). See Pet. App. 8a-9a, 15a-16a. *ABT* had held that the Treasury Amendment did not deprive the Commission of

jurisdiction over options on foreign currency, because a contract giving the holder the option to purchase or sell a foreign currency by a specified date at a specified price did not become a "transaction[ ] in" that currency, within the meaning of the Amendment, unless and until the option was exercised. See *id.* at 8a-9a; 803 F.2d at 1248. The Commission also cited *Board of Trade* v. *SEC*, 677 F.2d 1137, 1154 (7th Cir.) (options on Government National Mortgage Association securities not "transactions in * * * government securities" for Treasury Amendment purposes because "[o]nly when the option holder exercises the option is there a transaction in a government security"), vacated as moot, 459 U.S. 1026 (1982), and *CFTC* v. *Sterling Capital Co.*, [1980-1982 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 21,169, at 24,784 (N.D. Ga. Feb. 20, 1981) (*Sterling Capital*) (foreign currency options not "transactions in" foreign currency until exercised), modified on other grounds, [1980-1982 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 21,170 (N.D. Ga. Apr. 13, 1981). See 94-6197 C.A. App. A130-A134 (2d Cir.) (Letter from CFTC Regional Counsel to Hon. Thomas Griesa (May 24, 1994)).

The district court granted the Commission's motion for a temporary receiver, basing its jurisdictional determination on the Second Circuit's decision in *ABT*. See Pet. App. 8a, 16a. On petitioners' interlocutory appeal under 28 U.S.C. 1292(a)(2), the Second Circuit concluded that the Commission's evidentiary proffer "sufficiently demonstrated that defendants deceived investors and caused investors to receive false reports," conduct that would violate the CEA if the Commission had jurisdiction over petitioners' trading in currency options. *CFTC* v. *Dunn*, 58 F.3d 50, 53 (1995), rev'd on other grounds, 519 U.S. 465 (1997). The court rejected

petitioners' argument that the Commission had no such jurisdiction, relying on *ABT*'s interpretation of the Treasury Amendment: "This issue is foreclosed by clear precedent in this circuit that holds that the term 'transactions in foreign currency' does not include options, even those options traded off-exchange." *Ibid.* The court acknowledged that its holding conflicted with the Fourth Circuit's decision in *Tauber*, but it viewed that conflict as one "for the Supreme Court * * * to resolve." *Id.* at 54; see Pet. App. 16a & n.5.

This Court granted review, and reversed the Second Circuit's judgment. Pet. App. 12a-28a. Finding the relevant statutory language "plain," the Court held that the Treasury Amendment's term "transactions in foreign currency" includes transactions involving options to buy or sell foreign currency, as well as those involving foreign currency futures contracts (*i.e.*, "agreements to buy or sell a specified quantity of [foreign currency] at a particular price for delivery at a set future date"). *Id.* at 17a. On remand from this Court, the court of appeals in turn remanded the case to the district court, with instructions to dismiss the complaint. See *id.* at 9a.

2. In July 1996, petitioners filed an application with the district court seeking attorneys' fees and costs pursuant to the Equal Access to Justice Act (EAJA), 28 U.S.C. 2412. Pet. App. 6a, 9a. The district court denied the application. *Id.* at 6a-11a. The court reasoned that the Commission "had a reasonable basis in law for instigating litigation," because the Second Circuit's decision in *ABT* had "squarely addressed" the jurisdictional issue, and the Commission "was entitled to rely upon that decision in assessing whether to bring suit. Indeed it was obligated to follow that decision unless and until the decision was overruled." *Id.* at 10a.

The court further noted that the Commission had a "reasonable basis in fact for bringing suit," there being "no suggestion that [the Commission] failed to investigate the facts of the case or that they did not discover wrongdoing sufficient to warrant judicial intervention." *Ibid.* Accordingly, the court held that the Commission's decision to bring suit against petitioners was "substantially justified" within the meaning of the EAJA, and that petitioners were therefore not entitled to an award of fees or costs under that Act. *Ibid.*

3. The court of appeals affirmed. Pet. App. 1a-5a. The court first noted that the test of "substantial[ ] justifi[cation]" under the Act "is essentially one of reasonableness," and that the district court's resolution of the issue would be reversed only if that court had abused its discretion. *Id.* at 3a. The court then rejected (*id.* at 3a-5a) petitioners' argument that because this Court had unanimously rejected the holding and reasoning of the *ABT* opinion, on which the Commission had relied in bringing suit, the Commission could not have been "substantially justified" in asserting jurisdiction over petitioner's conduct in the first place. Observing that "[t]he issue for EAJA purposes is not what the law is when the EAJA application is made, but rather whether the government was substantially justified in believing the law not to have foreclosed its position during the underlying litigation," the court of appeals agreed with the district court that because *ABT* "was the binding law of this circuit on the jurisdictional question presented by this case during the filing and pendency of the CFTC's action against [petitioners], the CFTC was entitled to rely upon that authority, notwithstanding that the law changed thereafter." *Id.* at 4a.

## ARGUMENT

1. The court of appeals held (Pet. App. 1a-5a) that the district court did not abuse its discretion when it determined (*id.* at 6a-11a) that the CFTC was "substantially justified" in attempting to assert jurisdiction over petitioners' fraudulent dealings in foreign currency options. Both courts relied principally (*id.* at 4a, 10a) on the fact that at the time the Commission brought suit against petitioners, the court of appeals had already resolved the relevant jurisdictional question in the Commission's favor, and this Court had not yet held to the contrary (see *id.* at 12a-27a). Petitioners argue (Pet. 6-8) that the decision below conflicts with *Pierce* v. *Underwood*, 487 U.S. 552, 569 (1988). That argument lacks merit.

*Pierce* addressed two important issues under the EAJA: the meaning of the "substantially justified" standard, and how appellate courts should review district court decisions applying that standard. See 487 U.S. at 557-568. On the first point, the Court held that a legal position is "substantially justified" so long as it has a "reasonable basis both in law and fact." *Id.* at 565; see also *id.* at 566 n.2. As to the second, the Court made clear that a district court's determination to award or not to award fees is properly subject only to "deferential review" under an "abuse of discretion" standard. *Id.* at 559, 563; see *id.* at 557-563. Nothing in the decision below conflicts with either of those holdings.

As petitioners point out (Pet. 7), in *Pierce* the Court observed (in passing) that "the fact that one other court agreed or disagreed with the Government does not establish whether its position was substantially justified." 487 U.S. at 569. In relying on that observation here, however, petitioners ignore both the context in

which the Court made it and the circumstances of the present case.

In *Pierce*, the Court noted that both the government and the respondents cited various lower court decisions in support of their respective positions. 487 U.S. at 569. The Court held, however, only that the existing authority as a whole showed sufficient support for the respondents' position to make it impossible to conclude, "on the basis of these objective indications alone, that the District Court abused its discretion in finding no substantial justification" for the government's position. *Ibid.*

In this case, the district court concluded that the CFTC's jurisdictional position *was* substantially justified, relying primarily on the existence of the Second Circuit's decision in *CFTC* v. *American Board of Trade, Inc.*, 803 F.2d 1242 (1986), which was dispositive precedent in that Circuit at the time the Commission brought suit. Pet. App. 10a.[1] *ABT* was not only binding as a matter of authority in the jurisdiction where the Commission brought its case; it was also a reasoned decision by a unanimous panel of the Second Circuit—a court with considerable expertise in matters relating to commercial and financial regulation. Moreover, it relied on reasoning that had also been endorsed by two other courts, including the Seventh Circuit. See *ABT*, 803 F.2d at 1248, citing *Board of Trade* v. *SEC*, 677 F.2d 1137, 1154 (7th Cir.), vacated as moot, 459 U.S. 1026 (1982), and *CFTC* v. *Sterling Capital Co.*, [1980-

[1] The court also determined that the Commission's position had a "reasonable basis in fact," noting that there was "no suggestion that the CFTC failed to investigate the facts of the case or that they did not discover wrongdoing sufficient to warrant judicial intervention." Pet. App. 10a.

1982 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 21,169, at 24,783-24,784 (N.D. Ga. Feb. 20, 1981), modified on other grounds, [1980-1982 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 21,170 (N.D. Ga. Apr. 13, 1981).[2] Those circumstances are plainly sufficient, under *Pierce*, to support the court of appeals' holding that the district court did not abuse its discretion by finding that the government was substantially justified in making in this case precisely the same jurisdictional argument that had previously been accepted in *ABT*.

2. Petitioners argue further (Pet. 9-12) that the decision below with respect to attorneys fees conflicts with this Court's earlier decision on the merits in this case. As *Pierce* made clear, however, "a position can be justified even though it is not correct"; and for EAJA purposes a position is "substantially (*i.e.*, for the most part) justified if a reasonable person could think it correct." 487 U.S. at 566 n.2. Moreover, however clear a point of law may appear after this Court has resolved it, the question before a district court considering an EAJA application is "not what the law now is, but what the Government was substantially justified in believing it to have been." *Id.* at 561. The question on appeal from the district court's denial of an EAJA award is even narrower: Whether that court abused its discretion in concluding that, at the time the government acted, a reasonable person could have thought that its position was correct. See *id.* at 557-563.

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[2] In *Board of Trade* v. *SEC*, the court held that trading in options to buy or sell government securities did not involve "transactions in * * * government securities" for purposes of the Treasury Amendment, because "[o]nly when the option holder exercises the option is there a transaction in a government security." 677 F.2d at 1154. *Sterling Capital*, like *ABT*, applied the same reasoning to foreign currency options.

The courts below understood and applied those standards in this case. See Pet. App. 3a-4a, 10a. As the district court recognized (*id.* at 10a), in asserting jurisdiction over petitioners the CFTC relied on arguments that had already been accepted by the Second Circuit, as well as by other courts. Although this Court ultimately found those arguments unpersuasive (see *id.* at 17a), they were not unreasonable—particularly in light of the important public purposes that the Commission sought to further by pursuing remedies for the fraudulent conduct in which petitioners had engaged. See *id.* at 27a (acknowledging importance of Commission's claim that "options are particularly susceptible to fraud and abuse if not carefully policed"); *id.* at 10a (noting existence of factual basis for Commission's action); *CFTC* v. *Dunn*, 58 F.3d 50, 51-53 (2d Cir. 1995) (describing evidence and noting that "[t]he CFTC's evidentiary proffer sufficiently demonstrated that defendants deceived investors and caused investors to receive false reports," causing investors tens of millions of dollars in damage through "an old-fashioned 'Ponzi' scheme, accompanied by exotic financial vocabulary"), rev'd on other grounds, 519 U.S. 465 (1997).[3] In any event, as the court of appeals held (Pet. App. 9a-10a), it was within the district court's discretion to reach that conclusion. Compare *Pierce*, 487 U.S. at 569-571 (sustaining district court's exercise of discretion on question of substantial justification, despite existence of

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[3] There is no force to petitioners' argument (Pet. 5, 15-17) that the CFTC's action against them involved some sort of improper "jurisdictional gambit." Pet. 5, 17; see Pet. 15-17. To the contrary, the district court specifically found (Pet. App. 10a) that the Commission's suit against petitioners had a reasonable basis both in law and in fact.

cogent contrary arguments). Nothing in that determination warrants further review by this Court.

3. The applicability of an abuse-of-discretion standard also sufficiently answers petitioners' argument (Pet. 12-13) that the decision below conflicts with *Marcus* v. *Shalala*, 17 F.3d 1033 (7th Cir. 1994).[4] Although *Marcus* sustained a district court's EAJA award, it held only that "a reasonable person could agree with the district court." *Id.* at 1038. The court specifically rejected any invitation "to review the district court's decision by engaging in [its] own comprehensive analysis" of the substantial-justification issue, noting that "particularized appellate scrutiny * * * is to be avoided in reviewing a lower court's decision for abuse of discretion." *Ibid.* Indeed, the conclusion to *Marcus*'s discussion of the issue may be applied just as easily to this case: "Since the district court relied on the appropriate standard and its decision has a basis in reason, we cannot conclude that it abused its discretion." *Ibid.*

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[4] The court of appeals properly rejected (Pet. App. 4a) petitioners' claim (Pet. 13-15) that the court's decision in this case conflicts with its own previous decision in *FEC* v. *Political Contributions Data, Inc.*, 995 F.2d 383 (2d Cir. 1993), cert. denied, 510 U.S. 1116 (1994). Any such conflict would, in any event, be a matter for resolution by the Second Circuit, rather than by this Court. Cf. *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957).

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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AUGUST 1999